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# Children's Testimony in Sexual Abuse Cases: Ohio's Proposed Legislation

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# CHILDREN'S TESTIMONY IN SEXUAL ABUSE CASES: OHIO'S PROPOSED LEGISLATION

As the number of allegations of sexual abuse of children increase,[1] there is growing concern that the child-victim should not be subjected to increased trauma at the hands of the criminal justice system.[2] Normally, a child will have to "re-live" the incident during the court process at least three times: at the preliminary hearing, before the grand jury and at trial.[3] It is the resulting trauma from the retelling of this assault before the judge, the accused, the attorneys, the jury and the general public at the proceedings which may increase the trauma of bringing the alleged molester to trial.[4] The fear of exposing the child to this trauma is one of the reasons that these incidents may not be reported to the authorities.[5] Thus, legislatures are attempting to reduce the trauma to the child, and, at the same time, to increase convictions.[6]

This legislation is often in the form of permitting videotaped pretrial statements and depositions to be admitted into evidence. Additionally, some legislatures are permitting testimony of the child at depositions or at trial to take place in a separate room from the defendant, the judge, the jury and the general public through the use of closed circuit television or monitors. However, this legislation may present an encroachment of sixth amendment guarantees.

Section I of this comment will discuss whether or not the need truly exists for such legislation. Section II will examine past interpretations of the confrontation clause that may provide some standards for this legislation. Lastly, section III will examine the constitutionality of the proposed legislation as passed in the Ohio House of Representatives[7] and as amended in the Ohio Senate.[8]

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[1]The United States Government's National Center on Child Abuse and Neglect estimates that over 100,000 cases a year occur. Other studies, which are based on statistical projections estimate that between 200,000-500,000 cases occur each year. CHILD SEXUAL ABUSE: INCEST ASSAULT AND SEXUAL EXPLOITATION. NAT'L CENTER ON CHILD ABUSE & NEGLECT. U.S. DEPT OF HEALTH & HUMAN SERVICES (1981) [reporting possible incidence figures from different authorities].

[2]A. BURGESS & L. HOLMSTROM, THE CHILD AND FAMILY DURING THE COURT PROCESS, *reprinted in*, SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 205 (1978) (hereinafter cited as CHILD DURING COURT PROCESS); Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 1008 (1969) [hereinafter cited as Protection of the Child].

[3]*Id.*; Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW. ENG. L. REV. 643 (1982) (discussing the courts' lack of sensitivity to reliving the event).

[4]*See* Testimony of Sen. Lee Fisher, the sponsor of Ohio S. 16, which was another proposed legislation, January 30, 1985 [hereinafter cited as Testimony of Sen. Fisher]. However, Sub. H.B. No. 108 passed prior to the approval of S.B. 16. Nonetheless, the justifications for the proposed legislation are the same. Sen. Fisher also stated that fear of this trauma is the reason that so few cases result in convictions. F. RUSH. THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN 156-57 (1980) (discussing the conviction rates).

[5]Testimony of Sen. Fisher, *supra* note 4. "It is likely that more than 20,000 felony child molestations occur in Ohio each year; [and that] less than 2,000 (10%) of these offenses are reported to law enforcement authorities." *Id.*

[6]Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 DICK. L. REV. 645 (1985) [hereinafter cited as Procedural Trends].

[7]Sub. H.B. 108.

[8]LSC 116 0388-7, November 7, 1985 (text of modifications).

## I. Is There a Need to Protect the Child from the Legal Process?

Although a response to this question based on life experience may lead a person to believe that children should be protected because of their vulnerability due to their youth, one California court has noted that there is a lack of empirical data to demonstrate that the sexually abused child is, in fact, more traumatized than any other child by having to testify in the presence of the jury, the general public and the accused.[9] Rather, evidence of possible psychologically damaging effects is couched in very general terms.[10]

One of these general concerns is that the legal process is actually a second traumatization to the child.[11] The degree of trauma that the child experiences may be influenced by the way that the child is treated by the legal system once the offense is brought out into the open.[12] Trauma results from legal proceedings which may subject the child to repeated interrogations prior to trial and while testifying at trial.[13] Additionally, the child must face the accused in the intimidating courtroom atmosphere.[14]

The Supreme Court, in *Globe Newspaper v. Superior Court,*[15] recognized that the state has a compelling interest in protecting the child's psychological and physical well-being from further trauma and embarrassment.[16] Additionally, the often drawn-out process of the court proceeding prolongs the intrafamily crisis.[17] Arguably, any victim of a crime may suffer from the same stressful symptoms; however, a determinative factor of the degree of trauma appears to

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[9]*See* Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 793, 208 Cal. Rptr. 273, 283 (1984). *Compare* Skoler, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse,* 18 J. MAR. L. REV. 1, 39 (1984) [hereinafter cited as Hearsay Exceptions]. Meehl, *Law and Fireside Inductions: Some Reflections of a Clinical Psychiatrist,* 27 J. SOC. ISSUES 65 (1971).

[10]*Id.;* Cerkovnik, *The Sexual Abuse of Children: Myths, Research, and Policy Implications,* 89 DICK. L. REV. 691 (1985) (provides a review of some studies and empirical data of child sexual abuse); Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases,* 83 COLUM. L. REV. 1745, 1745-51 (1983).

[11]Bohmer and Blumberg, *Twice Traumatized: The Rape Victim and the Court,* 58 JUDICATURE 391, 398-99 (1975); Mahady-Smith, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?,* 89 DICK. L. REV. 721, 732 (1985); CHILD DURING COURT PROCESS, *supra* note 2, at 2; Comment, *Libai's Chila Courtroom: Is it Constitutional?,* 7 J. JUV. L. 31-32 (1983).

[12]M. GUTTAMACHER, SEX OFFENSES: THE PROBLEM, CAUSES AND PREVENTION 117-19 (1951).

[13]Protection of the Child, *supra* note 2, at 1008; Note, *Minnesota's Hearsay Exception for Child Victims of Sexual Abuse,* 11 WM. MITCHELL L. REV. 799, 800-01 (1985) (finds that Minnesota's hearsay exception is constitutional).

[14]State v. Sheppard, 197 N.J. Super. 411, 420, 484 A.2d 1330, 1334 (1984)

> Psychiatrists have identified components of the legal proceedings that are capable of putting a child victim under prolonged mental stress and endangering his [or her] emotional equilibrium: repeated interrogations and cross-examination, facing the accused again, the official atmosphere in court, the acquittal of the accused for want of corroborating evidence to the child's trustworthy testimony, and the conviction of a molester who is the child's parent or relative.

*Id.*

Protection of the Child *supra* note 2, at 984; Note, *Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim,* 15 U. MICH. J.L. REF. 131 (1981).

[15]457 U.S. 596 (1982). The experience of testifying in the courtroom "can be devastating and leave permanent scars". *Id.* at 618 (Burger, J., dissenting). However, the Court held that although this is a compelling interest, it did not justify the mandatory closure of a criminal trial from the general public.

[16]*Globe Newspaper,* 457 U.S. at 607.

[17]S. SGROI, INTRODUCTION: A NATIONAL NEEDS ASSESSMENT FOR PROTECTING CHILD VICTIMS OF SEXUAL

be the child's age, which reflects a lack of maturity.[18]

A 1981 study showed that the average age of the child-victim of sexual abuse was between eleven and fourteen years of age.[19] Vulnerability due to immaturity, coupled with the nature of the sexual crime itself, increases the likelihood of trauma to the child during the legal process. In order to minimize this trauma, perhaps the child should be given special consideration when dealing with the legal process. However, it is the extent of that protection which raises the confrontational issues.

## II. CONSTITUTIONAL REQUIREMENTS

The sixth amendment of the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[20] In *Mattox v. United States,*[21] the Court interpreted the right to confrontation as having as its primary object, the accused's right to a cross-examination of the witness, and to compel the witness to "*stand face to face with the jury* in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."[22] This right is not absolute and must occasionally give way to public policy.

Although this is a fundamental right,[23] the Court departs from its usual course of examination to determine whether the infringement of this right by the State is based on a compelling State interest.[24] Instead, cases arising under the confrontation clause are treated as evidentiary questions.[25] Perhaps this is one reason that the law is so uncertain in this area.

In *California v. Green,*[26] the Court determined that the confrontation clause has three purposes, the first of which is that the witness will testify

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ASSAULT, *reprinted in* SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS XV (1978).

[18]*See* Procedural Trends, *supra* note 6, at 647.

[19]*Child Sexual Abuse: Incest, Assault, and Sexual Exploitation,* NAT'L CENTER ON CHILD ABUSE AND NEGLECT 3 (rev. Apr. 1981).

[20]U.S. CONST. amend. VI; OHIO CONST. Art. VIII § 11 provides that the accused has the right "to meet the witnesses face to face."

[21]156 U.S. 237 (1895) (emphasis added).

[22]*Mattox,* 156 U.S. at 242-43. The Court permitted the preliminary examination testimony of the deceased witness to be admissible at trial. The Court also stated that "a technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant." *Id.* at 243; *See also* Barber v. Page, 390 U.S. 719 (1968).

[23]Pointer v. Texas, 380 U.S. 400, 403 (1965); Dutton v. Evans 400 U.S. 74, 79 (1970).

[24]*See, e.g.,* Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973).

[25]*See* Ohio v. Roberts, 448 U.S. 56 (1980). It appeared that the Court would apply the 'strict scrutiny' and the 'compelling state interest' examination to the confrontation clause for the first time; however, this approach was abruptly ended and the Court again examined the infringement as an evidentiary question. *Id.* at 64.

[26]399 U.S. 149 (1970).

under oath.[27] Thus, the possibility of a penalty for perjury will help to impress upon the witness the seriousness of the proceeding and to guard against dishonesty.[28] Secondly, the witness must be subjected to a cross-examination.[29] Lastly, the jury must be able to observe the witness' demeanor in order that it may assess his credibility.[30]

In its most recent interpretation of the confrontation clause, *Ohio v. Roberts,*[31] the Supreme Court set forth two criteria in order to reconcile the confrontation clause with the hearsay doctrine. These two requirements are: (1) unavailability and (2) reliability.[32] Mere absence of the witness alone does not satisfy the requirement of unavailability.[33] The prosecution must make a reasonable and good faith effort to secure the witness for testimony at trial.[34] Generally recognized categories of unavailability include: privilege, refusal to testify despite a court order to do so, lack of memory, death or then-existing physical or mental illness or infirmity, or absence because of an inability to procure attendance by process.[35]

Once unavailability has been established, the Court will turn to the issue of reliability. In *Roberts,* the Court recognized that the indicia of reliability may be established when the evidence falls within a firmly-rooted hearsay exception.[36] Otherwise, a particularized guarantee of trustworthiness must be demonstrated.[37] Thus, in order for proposed legislation to be constitutional, both of these prongs of the test must be satisfied.

## III. OHIO'S PROPOSED SOLUTIONS TO RECONCILING PROTECTION OF THE CHILD VICTIM AND THE CONFRONTATION CLAUSE

Faced with the competing interests of protecting the child from further traumatization and of satisfying the unavailability and reliability requirements

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[27] *Id.* at 158-59.

[28] *Id.*

[29] *Id. See also* Bruton v. United States, 391 U.S. 123 (1968) Co-defendant's confession, which implicated the defendant, was erroneously admitted at trial because the co-defendant did not take the stand. This denied the defendant's right to confront witnesses against him through cross-examination. *Id.*

[30] *Id.*

[31] 448 U.S. 56 (1980).

[32] *Id.* at 65-66. The Court noted, however, that a demonstration of unavailability is not always required. *Id.* at n. 7. *See* Dutton v. Evans, 400 U.S. 74 (1970).

[33] MCCORMICK, EVIDENCE § 756 (3d ed. 1984).

[34] *See* Barber v. Page, 390 U.S. 719 (1968) (Transcript of preliminary hearing testimony of a witness, who was incarcerated at the time of trial, was inadmissible when the prosecution had not attempted to secure the witness' presence). Stores v. State, 625 P.2d 820, 826 (Alaska 1980) (Witness' videotape deposition was improperly admitted where the prosecution failed to secure the witness to testify at trail because the witness was out of state, although the witness was willing to be present).

[35] *Roberts,* 448 U.S. at 74-75. *See also* FED. R. EVID. 804(a).

[36] 448 U.S. at 66.

[37] *Id. See Dutton,* 400 U.S. at 89 [Spontaneous statements, which are against the declarant's interests, are widely viewed as having sufficient reliability to be admitted].

of *Ohio v. Roberts*, the Ohio House of Representatives has passed legislation that will authorize, in certain criminal cases in which the alleged victim of the sex offense is a child under thirteen years of age: (a) the closing of the preliminary hearing; (b) the videotaping of the testimony of the child at the preliminary hearing and its use at trial in lieu of the child's testimony at trial; and (c) the taking of the child's testimony outside of the courtroom during trial to be simultaneously broadcast on closed-circuit television.[38]

The Ohio Senate has amended this legislation and it is currently pending in the Senate. As amended, the legislation will provide that if a child under the age of thirteen was the victim of a specified sex offense or if the child was involved in the offense, but was not a participant or conspirator, certain videotaped pretrial statements will be admitted at trial or the court may order that the child's testimony will be taken outside the courtroom at trial and televised into the courtroom or will be videotaped for replay in the courtroom.[39] Additionally, the legislation will permit a deposition of the child, that may be videotaped, to be admitted in lieu of testimony at trial.[40] Furthermore, the Ohio Bureau of Criminal Identification and Investigation (OBCII) must provide videotaping or television equipment and must also maintain a list of persons experienced in questioning children about alleged incidents of sexual abuse.[41] The constitutionality of these proposals will be examined in this section.

## A. *H.B. No. 108 as Passed by the House*

### 1. Preliminary Hearing Testimony

The legislation, as passed by the Ohio House of Representatives, provides that, upon a motion of the prosecution, the videotaped preliminary hearing

[38]Sub. H.B. No. 108, 116th General Assembly, Regular Session 1985-86.

[39]LSC 116 0388-7, November 7, 1985 test [The basis for the age requirement of under thirteen is not known. Perhaps the extension of protection should extend to all minors].

[40]*See* Proposed OHIO REV. CODE § 2151.3511(B)(1)(a) for juvenile proceedings (The Ohio legislation is currently considering proposed legislation. Any future references made herein to proposed legislation will be in the following format: Proposed § 2151.3511(B)(1)(9)). Proposed § 2907.41(B)(1)(a) provides:

> The court shall exclude from the room in which the testimony of the victim is to be taken every person except the judge, the bailiff, one or more interpreters when needed, the prosecutor in the case, the accused's counsel, and one person chosen by the victim. The person chosen by the victim shall not himself be a witness in the proceeding and both before and during the hearing, shall not discuss the testimony of the victim with any other witness in the action. The accused shall be permitted to observe and hear the testimony of the victim and shall be provided with an electronic means of communication with his counsel during the testimony, but shall be restricted to a location that is such that he cannot be seen or heard by the victim, except on a monitor provided for that purpose. The victim shall be provided with a monitor on which he can observe the accused during the victim's testimony.
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> If the case is being tried by a jury, the jury and the accused shall observe and hear the testimony of the victim in the same room so that the jury can observe the accused during the testimony.

Note: This comment will not discuss the issue of competency of the child to testify. *See* State v. Ryan, 103 Wash. 2d 165, 691 P.2d 197 (1984); State v. Segerberg, 131 Conn. 546, 41 A.2d 101 (1945); Melton *Children's Competency to Testify*, 5 LAW & HUM. BEHAV. 73 (1981); Note, *Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception*, 7 UNIV. OF PUGET SOUND L. REV. 387 (1984) [Hearsay exception is unconstitutional because it permits statements of incompetent witnesses to be admitted into evidence].

[41]LSC 116 0388-7 § 109.54(c)(1).

testimony of the child victim may be admitted in evidence in lieu of testimony at trial.[42] Additionally, the legislation provides that the preliminary hearing may be closed so long as the court determines that: (a) testifying before the general public will threaten serious psychological harm to the victim and (b) there is no alternative procedure to avoid the threatened harm.[43]

This closure to the general public implicates the first amendment right of access to criminal trials. The Court in *Globe Newspaper,*[44] had to determine if the asserted state interest of safeguarding the physical and mental well-being of the child was indeed compelling.[45] In order for the infringement of first amendment rights to be justified, the court must determine, on a case-by-case basis, whether the protection is necessary for each child.[46] The infringement must be narrowly tailored.[47] It appears that the proposed Ohio legislation will pass constitutional muster, since it requires the courts to make this case-by-case determination. The determinative factors enumerated in *Globe Newspaper* include: the nature of the crime; the victim's age; psychological maturity; the wishes of the victim; and the interests of the parents and relatives.[48] Thus, the court should decide whether to close the preliminary hearing according to these criteria.

If the court orders the preliminary hearing closed over the objection of the defendant,[49] only the judge, the bailiff, an interpreter (if needed), the prosecutor, the accused's counsel and one person chosen by the victim may be in the room with the child.[50] The "support" person chosen by the child may not testify at the hearing. The child cannot see or hear the accused without a monitor, which must be provided to the child specifically for that purpose. During the child's testimony, the accused must be provided with electronic means to see the child and to communicate with defense counsel.[51] Testimony conducted in this manner raises the issue of whether the confrontation clause requires face-to-face testimony between the accused and his or her accuser.[52]

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[42]Sub. H.B. No. 108 § 2945.49.

[43]*Id.* Proposed §§ 2937.101(A)(1)(a)&(b).

[44]457 U.S. 596 (1982).

[45]457 U.S. at 609. The infringement was held to be unconstitutional as closure was mandatory in all cases without of showing of the need for such protection.

[46]*Id.*

[47]*Id.*

[48]*Id.* at 608. Additionally, the general public is not precluded from viewing the videotaped testimony later at the trial, or if no videotape is made, a transcript of the hearing will be provided to the public as soon as practicable. Proposed § 2907.41(C). The closure order will only apply during the testimony of the child.

[49]Possibly Defense counsel should not file an objection to the closing of the preliminary hearing in writing as a possible means of avoiding the televised testimony.

[50]Proposed § 2937.101(B).

[51]*Id.*

[52]This issue will be discussed in a later section of this comment in conjunction with the closed-circuit televised testimony at trial.

Assuming that the testimony conducted in the above manner is constitutional, the prosecutor may seek to admit the preliminary testimony of the child in lieu of testifying at trial. The legislation sets forth four conditions to be satisfied before this testimony is admitted.[53] It appears that two of the conditions are meant to satisfy the requirements of *Roberts*. Specifically, these sections provide that, in order to be admitted into evidence, the trial court must determine that, if required to testify at trial, the victim will suffer such emotional trauma as to be medically unavailable or unavailable pursuant to Ohio Evidence Rule 804(a).[54] The accused must have had an opportunity and similar motive at the preliminary hearing to develop the testimony of the victim. Also, the testimony must satisfy the right to confrontation and exhibit the requisite "indicia of reliability."[55]

The threshold requirement in *Ohio v. Roberts* of unavailability will be examined first. Since the purpose of this legislation is to reduce the courtroom trauma to the child, the legislature is either equating psychological trauma to the child with "mental illness or infirmity" of the type in Rule 804(a) or is attempting to create a new category of "unavailability," that of psychological unavailability. Unfortunately, *Roberts* left open the question of what exact factors constitute unavailability.[56] In *Roberts,* the prosecution attempted to subpoena the witness at her parents' home five times; however, the witness was not residing there and her whereabouts were unknown.[57] Thus, the Court was dealing with an issue of physical, and not mental, unavailability. The Court held that the prosecution did not breach its duty of good faith efforts to secure the witness.[58] In child sexual abuse cases, it is not known what the prosecution must do to fulfill its "good faith" duty. Is the prosecutor required to secure some sort of counseling for the child in hope of the child becoming "mentally" available to testify? It is unlikely that a court may require such counseling because the prosecution is required only to go to "reasonable" lengths to secure a witness.[59]

An expert should be required to testify on the issue of the child's psychological unavailability. In *People v. Williams,*[60] a rape victim's testimony

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[53]Proposed § 2945.41(B)(1)(a)-(e).

[54]Proposed §§ 2945.41(B)(1)(c) & (d). OHIO R. EVID. 804(a) lists the categories of 'unavailability' as: privilege, refusing to testify, lack of memory, death or then existing physical or mental illness or infirmity or unable to procure attendance by process or other reasonable means.

[55]Proposed § 2945.41(B)(1)(d).

[56]However, in *Ryan,* 103 Wash. 2d 165, 691 P.2d 197, the court held that incompetency of the child does not suffice for the satisfaction of the 'unavailability' requirement. Thus, the admission of statements of the children who were not subpoenaed to testify at trial was improper without the requisite showing of unavailability.

[57]448 U.S. at 76.

[58]*Id.* at 75-76.

[59]*Id.* at 74 (quoting California v. Green, 399 U.S. 149, 189 n.22 (1970)).

[60]93 Cal. App. 3d 40, 155 Cal. Rptr. 414 (1979).

from a prior trial was admitted at a second trial under the former testimony exception to the hearsay rule.[61] No medical evidence was offered to show the witness' physical or emotional condition at the time of the hearing nor was evidence presented as to any probable effects, if she were required to testify.[62] Instead, the witness' friends, a police officer and even a judge from the first trial testified regarding her trauma before, during, and after testifying. The court held that, in the absence of medical testimony, unavailability could not be credibly established.[63]

Likewise, in *People v. Stritzinger,*[64] the only testimony on the unavailability of a child sexual abuse victim was that of the alleged victim's mother who described the child's emotional difficulties.[65] The court held that this was not competent evidence to establish unavailability.[66] Additionally, unavailability due to mental infirmity must be of such a degree that the witness' availability to testify must be "relatively impossible and not merely inconvenient" and established by competent evidence (expert testimony).[67]

Although the justification for this legislation is to protect the child victim from trauma, the child may have to undergo the trauma of repeated psychological evaluations and the reliving of the alleged incident during the evaluations. Such trauma may result because the prosecution bears the burden of providing expert testimony in order to establish unavailability.[68] The defendant may request an examination of the child in order to counter the prosecution's evidence. Thus, the child may be subjected to additional trauma due to the second examination.

It would be helpful for the Ohio legislature to provide criteria for establishing unavailability of the child witness, as other legislatures have done.[69] It would also be helpful for the legislature to define the term "expert" in this area. For instance, experts in this area may not only include physicians and

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[61] *Id.* at 49, 155 Cal. Rptr. at 418.

[62] *Id.* at 50, 155 Cal. Rptr. at 419.

[63] *Id.* at 54, 155 Cal. Rptr. at 421; *Compare* People v. Gomez, 26 Cal. App. 3d 225, 103 Cal. Rptr. 80 (1972) (Testimony of two physicians was sufficient to establish the victim-witness' mental 'unavailability').

[64] 34 Cal. 3d 505, 194 Cal. Rptr. 431, 668 P.2d 738 (1983).

[65] *Id.*

[66] *Id. See* United States v. Benfield, 593 F.2d 815, 817 (8th Cir. 1979) [Unavailability sufficiently established by expert testimony].

[67] *Id.* (quoting *Gomez,* 26 Cal. App. 3d at 230, 103 Cal. Rptr. at 801); People v. Stritzinger, 34 Cal. 3d 505, 668 P.2d 738, 750-51 (1983) (Kaus, J., concurring and dissenting). [This court also listed three purposes of the law in the area of sexual abuse of children as: "to punish the abuser, to identify and protect his victims and to cure him in order to protect future potential victims."]

[68] *Williams,* 93 Cal. App. 3d at 51, 155 Cal. Rptr. at 418; *See* People v. Enriquez, 19 Cal. 3d 221, 137 Cal. Rptr. 171, 561 P.2d 261 (1977).

[69] IND. CODE § 35-37-4-6 (1984) provides the following definitions of unavailability:

(i) a psychiatrist has certified that the child's participation in the trial would be a traumatic experience;
(ii) a physician has certified that the child cannot participate in the trial for medical reasons; or (iii) the court has determined that the child is incapable of understanding the nature and obligation of an

psychiatrists, but child counselors or licensed clinical social workers as well.[70]

Once unavailability is established, the court needs to determine if the testimony exhibits "indicia of reliability."[71] The proposed legislation is silent as to what this indicia may be. The court imposes the requirement of reliability because the witness' memory, perception, credibility and ability to communicate will not be tested in the courtroom in front of the jury.[72] Thus, the evidence must have a high degree of trustworthiness to insure that unreliable evidence is not being used against the defendant.[73]

It is in this context that the confrontational requirement of cross-examination and the reliability requirement overlap. The cross-examination theoretically tests all of the factors with which reliability is concerned. Again, for the purposes of the present discussion, the constitutionality of nonphysical confrontation between the accused and the witness will be assumed. If this technique is constitutional, the accused, through counsel, will be permitted to test the witness' memory, perception, credibility and ability to communicate.

In *Pointer v. Texas,*[74] the Court admitted into evidence the preliminary hearing testimony of its chief witness.[75] At the hearing, the defendant was not represented by counsel and the defendant did not attempt to cross-examine the witness.[76] This testimony was admitted in lieu of testimony at trial. The Court held that the defendant's confrontational guarantee of cross-examination had been denied.[77] However, the Court did point out that, had the defendant been represented by counsel and been given a complete and adequate opportunity for cross-examination, this right may not have been denied.[78] *Pointer* may be distinguished from the admission of the preliminary hearing testimony under the proposed Ohio legislation because the defendant will be able to participate in the cross-examination by communicating with counsel through the electronic device.

In *Roberts,* the Court admitted the preliminary hearing testimony of the

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oath.

*Id.*

[70] *See, e.g.,* CAL. EVID. CODE § 240 (amended and effective January 1, 1985, Assem. B. No. 3840 Stats. 1984, Ch. 40) This category in this statute includes: physicians, surgeons, psychiatrists, licensed clinical social workers, licensed marriage or family counselors.

[71] United States v. Nick, 604 F.2d 1199, 1203 (1979).

[72] *Id.*

[73] *Id.*

[74] *Pointer,* 380 U.S. at 400.

[75] *Id.*

[76] *Id.* at 401.

[77] *Id.* at 406; *Green,* 399 U.S. at 149 [Defendant's opportunity to cross-examine the witness at the preliminary hearing made this testimony admissible at trial]. However, *see Id.* at 192 (Brennan J., dissenting) ("A face-to-face encounter, of course, is important, not so the accused can view at trial his accuser's visage, but so that he can directly challenge the accuser's testimony before the factfinder").

[78] *Pointer,* 380 U.S. at 407; People v. Moran, 39 Cal. App. 3d 398, 406, 114 Cal. Rptr. 413, 417 (1974) [Court admitted the videotape testimony of the main prosecution witness where the defendant had a complete and adequate opportunity to cross-examine the witness at the preliminary hearing].

witness and held that because the defendant had the opportunity to cross-examine the witness and did so, the testimony was reliable and admissible.[79] However, *Roberts* may be distinguished because the confrontation involved was face-to-face. It appears from the holding in these cases that the Court is not adverse to admitting preliminary hearing testimony, so long as there is an adequate opportunity for cross-examination.

The Ohio House of Representatives attempted to further insure that the child witness could be fully and effectively cross-examined by providing that the judge may require the child to testify at trial, notwithstanding the existence of the videotape from the preliminary hearing, if any one of several factors apply. First, it may be necessary for the child to testify if evidence is discovered which was not available at the preliminary hearing.[80] This can almost always occur because the preliminary hearing takes place prior to discovery. Even though the defendant has access to any exhibits three days prior to the hearing,[81] other discoverable evidence will be beyond his review.[82] Thus, the child may have to testify at trial since the defendant is very likely to have newly-discovered evidence.

Another factor which requires the child to testify at trial occurs where the defendant has a different attorney for the trial than at the preliminary hearing.[83] Arguably, this may encourage the defendant to seek new counsel after the preliminary hearing or to have two different attorneys in the same law firm handle the different proceedings in the case. As this safeguard appears to be easily circumvented, trauma may accrue to the child because the child will have to undergo additional examination in order to establish unavailability once again for the trial if the judge determines that the preliminary hearing testimony is not admissible.

The third factor which may necessitate the child's testimony at trial occurs where defense counsel did not have adequate time to prepare for the preliminary hearing. It is very probable that defense counsel will wish to invoke this provision. In Ohio, the preliminary hearing must occur within five days after the defendant's arrest or service of summons.[84] Knowing that the preliminary hearing may be the defendant's only opportunity to cross-examine a child who is more than likely the prosecution's main witness in these cases, such a short amount of time to prepare for the cross-examination of such an important witness may be inadequate.

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[79] *Roberts*, 448 U.S. at 73. The Court noted that so long as the defendant has an adequate opportunity for cross examination at the preliminary hearing, the confrontation clause will still be satisfied absent actual cross-examination of the witness. *Id.* at 70.

[80] Proposed § 2945.49(B)(2)(a)(i).

[81] Proposed § 2937.11(A).

[82] OHIO R. CRIM. P. 16.

[83] Proposed § 2945.49(B)(2)(a)(ii).

[84] OHIO R. CRIM. P. 5(B)(1).

At face value, the three factors may appear to be safeguards for the defendant. However, an additional condition must always be fulfilled in order to necessitate the child's testimony at trial. This condition requires the judge to find "that the testimony of the victim is also necessary to protect the right of the defendant to a fair trial."[85]

2. Nonphysical Confrontation at Trial

This discussion will now focus on the constitutionality of the nonphysical confrontation between the accused and the child. If there was no preliminary hearing at the proceeding or it was not videotaped or if the judge requires that the child testify at trial,[86] the child's testimony may be conducted on closed-circuit television. The child will be testifying in a room other than the courtroom in a manner described above for the preliminary hearing testimony. Before testimony may be taken in this manner, the court must determine that the testimony of the victim before the general public would threaten serious psychological harm to the victim and that no alternative procedures are available to avoid this threatened harm.[87]

The supposed justification for permitting the testimony from a separate room is the prevention of serious psychological harm to the child which results from requiring the child to testify before the *general public.*[88] However, it appears that by precluding the defendant from being in the same room as the child, the legislature is truly seeking to prevent the child from being intimidated by the defendant alone.[89] Otherwise, only the general public would be excluded.

Furthermore, while the defendant is excluded from the room in which the child is testifying, a support person of the child's choosing is permitted to be in the room with the child.[90] Once the general public has been excluded from the room, the threat to the child about which the legislature is concerned is removed. The support person may only serve to reinforce the child's testimony against the defendant through eye contact. The defendant's only protection against this subtle reinforcement is through the television provided for the child, which is only turned on at the child's request.[91] No legitimate justifica-

[85] Proposed § 2945.49(B)(2)(b).

[86] Proposed § 2907.41(A).

[87] Proposed §§ 2907.41(A)(1) & (2).

[88] *Id.* (emphasis added).

[89] The Sixth Circuit has recognized that, if a witness has been so intimidated by a threat of violence from the defendant that the witness refuses to testify, pre-trial statements are admissible where there is sufficient indicia of reliability. Rice v. Marshall, 709 F.2d 1100 (6th Cir. 1983), *cert. denied,* 465 U.S. 1034 (1984); *See* United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), *cert. denied,* 431 U.S. 914 (1977) (Where defendant had intimidated witness to ensure witness' unavailability at trial, defendant waived his right to confrontation).

[90] Proposed § 2907.41(B)(1).

[91] Proposed § 2907.101(B).

tion exists for having the support person in the room unless the true purpose of the legislation is also to include the prevention of possible intimidation of the child by having to testify in front of the accused. Therefore, by excluding the defendant from the room, but permitting the support person to be with the child, the legislation may be overbroad once the harm from testifying before the general public is removed.

Additionally, if the support person is in the room with the child at the preliminary hearing, this person may still testify at trial. This may be a violation of the defendant's right to separation of witnesses. Thus, the support person should be precluded from testifying at trial, as is the case if the support person is in the room with the child who is testifying through closed-circuit television at the trial itself.

If the child testifies through closed-circuit television, two of the three purposes of the confrontation clause listed in *California v. Green*[92] are satisfied by separation. During the preliminary hearing or at trial, the child will be under oath; thus, this first requirement is satisfied. Secondly, the necessity of the jury's ability to view the demeanor of the witness may arguably be fulfilled because the witness' demeanor may be conveyed through the videotape. However, some courts have shown concern that the videotape or televised testimony may result in evidence distortion.[93] Such distortion may result from the technology of the television equipment. The fear also exists that by seeing the testimony on television, it may add more credibility to the witness' testimony.[94] Thus, this evidence distortion may affect the jurors' impression of the witness' demeanor. Other courts state that the videotape or televised testimony will accurately portray whether the witness is faltering, hesitant, uncertain, tired, or intimidated while testifying.[95]

The third purpose of the confrontation clause is to insure that the defendant's right of cross-examination of the witness has been fulfilled.[96] This purpose is implicated the most under the proposed legislation. Obviously, the authors of the sixth amendment could not anticipate that such televised testimony would be technologically possible. Additional uncertainty in this

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[92] 399 U.S. 149, 159 (1970).

[93] *Stores*, 625 P.2d at 820, n.25; Note, *The Criminal Videotape Trial: Serious Constitutional Questions*, 55 OR. L. REV. 567 (1976).

[94] Hochheiser v. Superior Court, 161 Cal. App. 3d 777,787, 208 Cal. Rptr. 273, 279 (1984) [Closed circuit television affects the presumption of innocence].

[95] *Moran*, 39 Cal. App. 3d at 409, 114 Cal. Rptr. at 419; State v. Hewett, 86 Wash. 2d 487, 545 P.2d 1201 (1976) [Videotape is an efficient means of reproduction of testimony]; Hutchins v. State, 286 So. 2d 244, 246 (Fla. Dist. Ct. App. 1973) [Videotape enables trier of fact a better opportunity to observe the demeanor and credibility of the witness]; McCrystal, *Videotape Trials: Relief for Our Congested Courts*, 49 DEN. L.J. 463 (1973) [Judge McCrystal (Court of Common Pleas, Erie County, Sandusky, Ohio) strongly supports and often uses videotaped testimony at trials.]; Barber & Bates, *Videotape in Criminal Proceedings*, 25 HASTINGS L.J. 1017, 1037 (1974) (Proposes that the use of videotaped testimony should not be precluded because of 'nebulous fears').

[96] *Green*, 399 U.S. at 158.

area remains because the Supreme Court has never explicitly held that a face-to-face confrontation between the accuser and the accused is necessary. However, the Supreme Court has stated that an adequate opportunity for cross-examination may satisfy the confrontation clause "even in the absence of physical confrontation."[97] The extent to which the Court will be willing to apply this dicta remains to be seen.

The state courts also differ on the issue of whether the confrontation clause requires a physical confrontation. In *Herbert v. Superior Court,*[98] the child was seated so that the defendant and the child could not see each other, although all of the other people could see both of them. Also, the defendant was able to give a hand signal if he wished to communicate with his counsel. The court held that to permit the child to testify without a face-to-face confrontation denied the defendant his right to confrontation.[99] The court also felt that to preclude physical confrontation was to impermissibly preclude an effective means for determining veracity, particularly because there was no showing that the separation was necessary.[100] This case may be distinguished because the proposed legislation requires a case-by-case showing that there is a necessity of protecting the child. Perhaps this determination will prevent the provision from being overbroad for this reason. However, the court, in *Kansas City v. McCoy,*[101] held that to require a physical confrontation of a witness, where the witness' testimony was broadcast in the courtroom by closed-circuit television, would be to require more than the confrontation rights of the accused demand.[102]

In *State v. Shepard,*[103] the court granted a motion to permit the testimony of a ten year old victim of an alleged sexual abuse to be simultaneously broadcast into the courtroom. The defendant had the means to communicate privately with his counsel through an audio connection. The court indicated that the opportunity for cross-examination is the primary right of confrontation and that the witness' presence before the judge and jury alone is necessary

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[97]Douglas v. Alabama, 380 U.S. 415, 418 (1965). Proposed § 2907.41(A); Proposed § 2151.3511 (juvenile).

[98]117 Cal. App. 3d 665, 668, 172 Cal. Rptr. 850, 853 (1981).

[99]*Id. See* State v. Strable, 313 N.W.2d 497, 501 (Iowa 1981). [A blackboard was placed between the defendant and the child-victim because she would be too embarrassed to testify without the blackboard, although she would not refuse to do so. The court held that this was harmless error.]; *See also* 5 J. WIGMORE, EVIDENCE, § 1395 (3d ed. 1940) The primary purpose of confrontation is to enable the judge and jury to "obtain the elusive and incommunicable evidence of a witness' deportment while testifying." However, any advantage which arises from the confrontation between the opponent and the witness is only secondary. *Id.*

[100]*Herbert,* 117 Cal. App. 3d at 668, 172 Cal. Rptr. at 853.

[101]525 S.W.2d 336, (Mo. 1975). The expert witness was testifying from his laboratory. *But see Hochheiser,* 161 Cal. App. 3d 377, 208 Cal. Rptr. 273 [Court held that, in the absence of legislation, testimony through closed-circuit television would not be admitted].

[102]525 S.W.2d at 339.

[103]197 N.J. Super. 411, 484 A.2d 1330 (1984).

for assessing demeanor.[104] Any advantage which arises from the confrontation between the accused and the witness is only secondary. Under this analysis, the proposed legislation would be constitutional because the defendant is provided with an electronic means of communicating with counsel. Thus, the constitutionality of the closed-circuit television testimony depends upon whether the court will strictly require physical confrontation.

### B. *Proposed Amendments by the Senate*

The Ohio Senate proposed to broaden the scope of the legislation to include not only the child victim, but any child involved in the offense other than a participant or a conspirator.[105] Thus, if the child witnessed the abuse, the child may be protected by the legislation. The necessity for protecting the witness may not be justified, as this child is technically "once-removed" from the abuse. If the legislation is narrowly drawn,[106] the court may not extend protection to the child-witness since the state is going beyond protecting legitimate interests as a witness of the abuse may not be as severely effected emotionally as the victim. However, if evidence of severe trauma to the child witness can be established by expert testimony, then the court may find the state has a legitimate and compelling interest in protecting this child.[107]

The Senate version also required the OBCII to maintain a list of persons experienced in investigation of sex offenses.[108] Standing alone, this provision does not appear significant. However, the Senate version will permit the videotape of the pretrial interview of the child regarding the alleged offense to be admitted into evidence.[109] Of course, the person conducting the interview may be obtained from the list provided by the OBCII.[110] This list will be compiled by the OBCII and measures should be taken to insure that the compilation of this list is neutral, so that the questions asked during the course of the interview have a greater chance of not being biased toward the State.

Before the videotape of this interview can be admitted into evidence, the

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[104] *Id.* at 427-28, 484 A.2d at 1339-40 (quoting J. WIGMORE, EVIDENCE (Chadbourne Rev. 1974)). *But see* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 HARV. L. REV. 567 (1978). Confrontation "requires the state, wherever possible, to present its evidence against the accused in what is traditionally considered the most reliable form, that of direct testimony in open court." *Id.* at 578.

[105] LSC 116-0388-7; Proposed §§ 2151.3511 & 2907.41.

[106] *Griswold,* 381 U.S. at 485.

[107] People v. Stritzinger, 34 Cal. 3d 505, 668 P.2d 738, 194 Cal. Rptr. 431 (1983); People v. Williams, 93 Cal. App. 3d 40, 155 Cal. Rptr. 414 (1979).

[108] Amended OHIO REV. CODE ANN. § 109.54(C)(1) provides that the OBCII will also obtain and provide the equipment to be used in videotaping or televising such statements. (The legislation as originally proposed has been amended. The amendments will be cited in the following format Amended § 109.54(c)(1)).

[109] Amended § 2151.3511 (A) [Juvenile]; 2907.41.

[110] Amended § 109.54(B).

legislation requires eight conditions to be satisfied.[111] In *Long v. State,*[112] the admission of this type of interview under a Texas statute, after which the Ohio amendments were patterned, was held to be unconstitutional.[113] The most significant conditions are: (1) that no attorney for the prosecution or the defense is present; and (2) there is a subsequent opportunity to confront the witness either in a deposition or at trial.[114] The Texas court found that the tape was hearsay and that it contained no indicia of reliability, particularly because of the complete absence of cross-examination during the testimony as counsel was not permitted to be present at the examination. The court said that the subsequent opportunity to confront a witness at the deposition or at trial was not an adequate substitute.[115] One concern was that the admission of this tape may also place the accused in the disadvantaged position of having to call the child as a defense witness.

However, another appellate court in Texas has held that the admission of the videotape pursuant to the Texas statute was constitutional because of the child's availability to testify at trial.[116] The court in *Long* felt that despite this prior ruling, the jury's initial impression of the defendant could not be sufficiently counteracted by the post hoc opportunity to cross-examine the child.[117]

In order to admit this examination into evidence, the child must be available to testify at a subsequent deposition or at trial.[118] Due to this additional requirement, it appears that this section of the statute will not satisfy the "unavailability" prong of the *Ohio v. Roberts* criteria. If the child is required to be available to testify at a later proceeding, the child is not unavailable for testimony. Thus, the admission of this videotaped interview is precluded under *Roberts.*

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Amended § 2907.41:

(1) No attorney for either the prosecution or the defense was present when the statement was made; (2) The recording is both aural and visual and is recorded on film or videotape, or by other electronic means; (3) The recording is authenticated . . .; (4) The statement was not made in response to questioning designed or calculated to lead or induce the child who made the statement to make a particular statement, provided that if the judge in the proceeding determines that any portion of the statement was made in response to such questioning and the statement would otherwise be admissible under this section, the judge may direct that the portion of the statement that was made in response to such questioning to be edited out . . .; (5) Each voice . . . is identified; (6) the person who conducted the interview of the child . . . is present at the proceeding and is available at the proceeding to testify or be cross-examined . . .; (7) The defendant or his attorney is afforded an opportunity to view the recording at a reasonable time before it is to be offered into evidence; (8) either a deposition of the child who made the statement . . . has been admitted as evidence in the proceeding, or the child . . . is available to testify.

694 S.W.2d 185 (Tex. Crim. App. 1985); TEX. CODE CRIM. PROC. ANN. art. 38.071 § 2 (Vernon Supp. 85).

694 S.W.2d at 185.

Amended § 2907.41(A)(1), (4), (6), ( (7).

694 S.W.2d at 191-92. The belated cross-examination was inadequate because the witness did not testify ntemporaneously with the introduction of the hearsay statement.

olly v. State, 681 S.W.2d 689 (Tex. Crim. App. 1984).

*ong,* 694 S.W.2d at 192.

roposed §§ 2907.41(A) & (B).

This videotaped interview is also likely to fail the "indicia of reliability" standard of *Roberts.* It may be argued that the child's testimony would be more reliable than the in-court testimony because the statement was made while the alleged act was more fresh in the young child's memory. This argument would be illustrative of circular reasoning. Thus, on one hand, the state would propose that the child's memory is sufficiently good to afford the defendant an adequate opportunity for cross-examination at a deposition or a trial in order to admit the videotaped interview into evidence. At the same time, the state would propose that the videotaped interview will be more reliable because at a later time, the child's memory will be more faulty; thus, the defendant will not have an adequate opportunity for cross-examination.

The legislation does have one built-in safeguard of reliability. The examiner is precluded from asking the child leading questions during the interview and any questions that the judge determines to be so are edited from the tape.[119] Other indicia of reliability may be: "(1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness."[120] Given these reliability factors, if a cross-examination would be superfluous and would not expose inaccuracy, then to deny confrontation is unconstitutional.[121]

Any of these factors may be implicated in the child's statement to the examiner, but no opportunity is given to check for inaccuracy because counsel was not present. Also, the delay between this statement and the subsequent cross-examination at a later proceeding might not expose faulty testimony because the child's memory may, in fact, be more inaccurate. The requirement that the examiner be available to testify at trial in order for the videotaped investigation to be admissible does not serve as an adequate check against inaccuracies in the child's statement because this only ensures that the examiner's technique during the examination was correct.

However, in *United States v. Nick,*[122] the court admitted into evidence a three-year old victim's statements to a physician about the incident because they fell within the hearsay exception of "statements made for the purpose of

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[119] Proposed § 2907.41(A)(4).

[120] State v. Ryan, 103 Wash. 2d 165, 175, 691 P.2d 197, 205 (1984); *See also* Bertrang v. State, 50 Wis. 2d 702, 708, 184 N.W.2d 867, 870 (1971) ("the trial court should consider the age of the child, the nature of the assault, physical evidence of such assault, relationship of the child to the defendant, contemporaneity and spontaneity of the assertions in relation to the alleged assault").

[121] *Id. See* Davis v. Alaska, 415 U.S. 308, 318 (1974) (*citing* Smith v. Illinois, 390 U.S. 129, 131 (1968)); Comment, *Sexual Abuse of Children-Washington's New Hearsay Exception,* 58 WASH. L. REV. 813, 819 (1983) [Determines that these hearsay statement are reliable and constitutional].

[122] 604 F.2d 1199 (9th Cir. 1979). A similar admissibility is unavailable in Ohio because the Ohio Rules of Evidence do not have a "catch all" exception similar to FED. R. EVID. 803(24).

medical diagnosis or treatment."[123] The court also admitted into evidence the statements of the child to his mother when he initially told her about the incident because these statements fell within the "excited utterances" exception.[124] Additionally, the court stated that Federal Rule of Evidence 803(24) "catch all" exception to the hearsay rule provided useful criteria for determining reliability, which the statements satisfied.[125] The child could not have been called as a witness because of his age and, thus, could not be cross-examined regarding these statements. Nonetheless, the court felt that the statements contained sufficient indicia of reliability as they contained childish terminology, which had "the ring of veracity" and because there was physical evidence to corroborate the child's statement.[126]

The admission of these statements may be distinguished from the statements contained in the videotaped interview under the Ohio legislation because the statements within *Nick* fell within firmly-rooted hearsay exceptions, which satisfies the *Roberts'* reliability requirement.

Under the Ohio legislation, the interview is not being conducted for the purpose of medical diagnosis or treatment, rather it is investigative in nature. Furthermore, the same circuit later found that the *Nick* court's reliance on the "catch-all" exception as providing criteria for reliability was inappropriate.[127] Also, the interview may not fall within the excited utterance exception, as it may be conducted after the child was under the stress of perceiving the event.

In *United States v. Iron Shell,*[128] the child victim's statements to a physician were admitted because they fell within the medical diagnosis exception. The court also admitted statements made by the child in response to a police officer's sole question of "What happened?" as being an excited utterance.[129] Although the child was unable to repeat these statements at trial, the court stated that the child was still under distress from the event when she made the statement to the officer one hour after the event allegedly occurred.[130] Under the Ohio legislation, the investigator will be conducting a much more thorough

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[123] *Id.*

[124] *Id.* at 1202. In United States v. Renville, 779 F.2d 430 (8th Cir. 1985), the court broadened the scope of this provision to include statements of the child to her physician which identified the defendant.

[125] *Id.* In a very recent decision, the United States Court of Appeals for the Eighth Circuit admitted a four-year old's statements under the residual hearsay exception of FED. R. EVID. 803(24). The court held that this exception was the equivalent of circumstantial guarantees of trustworthiness. United States v. Cree, 778 F.2d 474 (8th Cir. 1985).

[126] *Id.*

[127] United States v. Perez, 658 F.2d 654, 661 n. 6 (9th Cir. 1981); Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule,* 57 N.Y.U.L. REV. 867 (1982).

[128] 633 F.2d 77, 82-85 (8th Cir. 1980), *cert. denied,* 450 U.S. 1001 (1981).

[129] *Id.* at 85-87. *See also* State v. Slider, 38 Wash. App. 689, 688 P.2d 538 (1984) (Child's statements made in response to her mother's questions on the morning after the incident were held to be excited utterances, as the child was still under distress from the event).

[130] *Id.*

inquiry and this may destroy the excitement necessary to fall within this exception.[131]

The proposed Senate amendments to the legislation provide that the deposition need not always be videotaped.[132] If the deposition is not videotaped, then the defendant shall have the right to attend the deposition and the right to be represented by counsel.[133] Thus, the accused is entitled to a face-to-face confrontation at this deposition. However, the prosecution or defense may request that the deposition be videotaped. If the judge orders the videotaping of the deposition, then the accused does not receive a physical confrontation with the child. Thus, this encourages the prosecution to routinely request a videotaped deposition.

If videotaped, all persons are excluded from the room in which the child is testifying except for the judge, the prosecution and defense counsel, one support person chosen by the accused and any other person whom the judge determines would contribute to the well-being of the child.[134] Only the support person chosen by the child will be precluded from testifying in the proceedings. The defendant shall be able to view the child on a monitor and the child will be provided with a monitor for viewing the defendant. Again, the child is not required to turn on the monitor. The defendant must be provided with an electronic means of communicating with counsel.[135] If the deposition is not admitted into evidence by the court, then either party may call the child to testify at trial.[136] Additionally, if the child is to testify for the first time in the proceedings at trial, then the child's testimony may be taken by deposition under the same specifications as set forth above. The prosecution is again encouraged to eliminate the physical confrontation at trial by requesting a deposition.

The deposition testimony of the child must satisfy the confrontation and *Roberts'* criteria.[137] It does not appear that the deposition testimony under the Senate amendments will satisfy this requirement. The Senate version appears to be arbitrary and raises the issue of whether the state is truly attempting to protect the child by permitting the child to testify in a separate room.

The purported state interest is to protect the child from the trauma of

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[131] *Id.* at 86.

[132] *Compare* Proposed §§ 2907.41(B)(1)(a) and Proposed § 2907.41(B)(1)(b).

[133] Amended § 2907.41(B)(1)(a).

[134] *Id.* Note that the judge may permit more support persons to be in the room than in the House version (Proposed § 2907.41(B)(1)). Under the Senate version, it is also optional for the judge to remain in the room. The judge will view the testimony on a monitor and will have an electronic means of communication.

[135] *Id.*

[136] Amended § 2907.41 (B)(2).

[137] *See* State v. Wilkinson, 64 Ohio St. 2d 308, 415 N.E.2d 261 (1980). Defendants are guaranteed the right of cross-examination and confrontation even if the witnesses against him testify at a deposition rather than at trial; State v. Donnelly, 17 Ohio Misc. 2d 1, 477 N.E.2d 1243 (1984). The court noted that the admission of a videotaped deposition is proper where the witness is unavailable and where the defendant and his counsel were both present to cross-examine the witness at the deposition.

aware and other states have a vital interest in enforcing licensing and registration laws.[68] However, the Court did not agree with Delaware's contention that this public interest outweighed the privacy intrusion caused by discretionary spot checks.[69] The Court articulated two reasons for its conclusion. First, there were less intrusive alternative means available for enforcing licensing and registration laws.[70] Second, random spot checks were found to be unproductive in terms of discovering or deterring unlicensed drivers.[71] In sum, the Court was "unconvinced that the incremental contribution to highway safety of the random spot check justifies the practice under the Fourth Amendment."[72]

Adhering to its random versus systematic stop analysis, the Court in dicta suggested that license and registration checkpoints would pass constitutional muster.[73] In a subsequent case, *Texas v. Brown*,[74] a plurality of the Court cited the *Prouse* dicta as authorizing license and registration checks.

*Post-Prouse Issues*

Although the Court's decisions have made it clear that the permissibility of suspicionless roadblock stops hinges on adherence to "neutral criteria," they have not articulated a clear test for when the neutral criteria standard is applicable.[75] As a result, courts considering the constitutionality of DUI roadblocks have reached different conclusions.[76] Since *Delaware v. Prouse* is the most recent Supreme Court decision regarding automobile stops, several issues left unresolved by *Prouse* are highlighted by subsequent decisions.[77] Some unresolved issues relate to the use of roadblocks in general. First, the *Prouse* Court did not consider the nature of the state interest which might be advanced by DUI roadblocks.[78] Second, although recognizing the need to limit police discretion and subjective intrusion, *Prouse* did not explain how these elements interrelate to form the necessary neutral criteria.[79] Third, it is unclear

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[68] *Id.* at 658.

[69] *Id.* at 658-62.

[70] *Id.* at 659. The Court noted that "[t]he foremost method of enforcing traffic and safety regulations . . . is acting upon observed violations." *Id.*

[71] *Id.* at 659-60. The Court reasoned that since the percentage of unlicensed drivers on the road is very small an inordinate number of licensed drivers would need to be stopped in order to find one unlicensed operator. *Id.* at 660.

[72] *Id.* at 659.

[73] *See supra* note 13 and accompanying text.

[74] 460 U.S. 730 (1983) (plurality opinion). In *Brown* the defendant was stopped at a drivers license checkpoint at which time a police officer seized a balloon containing drugs in "plain view." *Id.* at 733. The state court "did not 'question . . . the validity of the officer's initial stop of [the] vehicle as part of a license check.'" *Id.* at 739 (citing Brown v. State, 617 S.W.2d 196, 200 (Tex. Crim. App. 1981). The plurality noted its approval of the stop by stating "we agree." *Brown*, 460 U.S. at 739.

[75] *See Filling in the Blanks after Prouse, supra* note 14, at 248-49.

[76] *Id.* at 249.

[77] *See Drunk Drivers In Indiana, supra* note 2, at 1074.

[78] *Curbing the Drunk Driver supra* note 2, at 1470.

[79] *Id.*

participate in the questioning of the witness. The defendant's ability to communicate with counsel through the buzzer was held to not provide the defendant with an adequate opportunity to participate in the questioning of the witness.[144] Thus, the preclusion of the physical confrontation between the accused and the child under the Ohio Senate amendments may not satisfy the confrontation requirements.

The admission of the videotaped deposition also turns on the issues of availability and reliability. As in the House version of this legislation, the Senate seeks to create a new category of "emotional trauma" unavailability or to equate severe emotional trauma to the child while testifying as "mental infirmity or illness."[145] If, in fact, the creation of this new category is justified, the same concerns are raised in the Senate amendments as were found in the House version with respect to exactly what constitutes unavailability, what the prosecution must do in order to fulfill its good faith requirement of attempting to secure the child's testimony for trial and what type of evidence is necessary to establish that the child will, in fact, be severely traumatized.[146]

Assuming that these depositions can pass the threshold test of unavailability, the deposition must further be examined to determine whether a sufficient indicia of reliability exists. The Court in *Dutton v. Evans,*[147] listed reliability criteria; (1) whether the statement contains an assertion of past fact; (2) whether the declarant had personal knowledge of the identity and the role of the other participants; (3) whether or not the statement was founded on faulty recollection; or (4) whether the circumstances under which the statements where made provided the basis for belief that the accused's involvement was not misrepresented.[148] All four factors do not need to be shown.[149]

The circumstances under which the child's statements where made at the deposition may indicate that the defendant's involvement may have been misrepresented. The child will be sitting in the room surrounded by "support" people; whereas, the accused's interests are protected only by the defense counsel and a television monitor, if the child chooses to have it turned on at all.[150] Any faulty recollection that the child has may only be reinforced by the fact that a support person is permitted in the room with the child. This reinforcement can be intensified if more than one person is permitted in the room at the judge's discretion. Thus, it appears that the deposition testimony may not have sufficient indicia of reliability and it may be precluded from being ad-

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[144] *Id.*

[145] *See supra* text accompanying notes 55-70.

[146] *Id.*

[147] 400 U.S. 74 (1970); *See Perez,* 658 F.2d at 661.

[148] 400 U.S. at 88-89. The Court admitted statements under the 'co-conspirator' exception to the hearsay rule.

[149] *Id.*

[150] Having additional support persons in the room may implicate 'separation of witnesses' because only the support person chosen by the child is prohibited from testifying. Amended § 2907.41(B)(1)(b).

mitted into evidence as unconstitutional.

Under the provisions of the proposed legislation, before the deposition can be admitted into evidence, the defendant must have had an opportunity and similar motive to develop the child's testimony, in addition to the showing of emotional shock or trauma.[151] Absent a physical confrontation, the question remains open as to whether the defendant had an adequate opportunity to develop the child's testimony through direct, cross or redirect examination. If the defendant knows that the deposition may be used in lieu of trial testimony, the defendant should have the requisite motive to develop the testimony.

The legislation in the Senate provides that the child's testimony at trial may be conducted by closed-circuit television, as does the House version.[152] Again, whether the confrontation must be face-to-face is at issue.[153] Also, the statute fails to provide the reasons for or the criteria under which the judge may make the determination that the child needs the special protection of testifying in a separate room. Because as many support persons as the court feels are needed to protect the child's well-being may be present in the room, similar problems as noted above regarding the accuracy of the child's testimony may arise.[154]

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[151] Amended § 2907.41(C)(2)(a).

[152] Amended § 2907.41(D).

[153] *See supra* note 8 and accompanying text.

[154] *See supra* note 136 and accompanying text.

The Ohio Senate has recently made additional modifications to Sub House Bill 108. This amended version was passed by the Senate in February, 1986. The following are the key changes.

First, the scope of the Statute will apply to children who are under ten years of age, as opposed to the original age requirement of under thirteen years. Secondly, defense counsel may make only two types of motions under the bill as passed by the Senate. Under the original Senate amendments, the prosecution or defense counsel were both able to invoke the statutory provisions of admitting the child's recorded interview statement, moving for a deposition of the child, and moving for the closed circuit testimony. These statutory options are no longer available to defense counsel.

However, under the version passed by the Senate, the defendant is able to move for a hearing concerning the reliability of the child's interview. Additionally, the court is required to make essentially similar inquiries regarding the reliability of the statement, in the absence of a defense motion, to determine if the entire statement or any portion thereof is sufficiently reliable to be admitted into evidence. The "reliability hearing" shall be conducted in two stages. During both stages, the court is limited to considering the following:

> [a] whether the person who conducted the interview of the child who made the statement was competent to conduct the interview;
>
> [b] whether the child who made the statement was unduly rehearsed or prepared prior to making the statement;
>
> [c] whether the statement was made in response to questioning designed or calculated to lead or induce the child who made the statement to make a particular statement;
>
> [d] whether the manner in which the interview of the child who made the statement was conducted or the setting in which the interview was conducted was such that there is a reasonable likelihood that the statement is unreliable due to the undue influence of the setting or any person over the child in his making the statement;
>
> [e] whether the manner in which the statement was recorded was such that there is a reasonable likelihood that the statement is unreliable;
>
> [f] whether there is a reasonable likelihood that the recording or statement is unreliable, based on any other indicia of unreliability exhibited in the recording or statement.

Amended §§ 2907.41(A)(2) and 2151.3511(A)(2).

The first stage of the hearing is to be conducted without testimony from the child. However, if the court feels that any one of the above factors are questionable regarding reliability, then stage two of the hearing is conducted. The child is required to testify in stage two. The child may be examined and cross-examined by

## CONCLUSION

As more and more state legislatures feel the need to protect an alleged child victim from further traumatization in the legal process, more legislation will be passed.[155] Unfortunately, there have been relatively few cases decided by the Supreme Court which provide useful guidelines in such a sensitive area of the law. Concern is growing over the number of alleged incidents of sexual abuse of children; however, the nature of these accusations also cast much social stigma on the person who is accused of commiting this type of offense. Additionally, the child may not be protected at the expense of the defendant's right to sixth amendment confrontation. Thus, the legislatures must try to maintain the delicate balance between confrontation and protecting one of the most vulnerable sectors of society — it's young.

The current attempt by the Ohio House of Representatives appears to have maintained this delicate balance better than its counterpart, the Senate. However, until more cases arising out of this new type of child sexual abuse legislation reach the higher courts, many unanswered questions will remain.

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the prosecution and defense counsel, in chambers, before the judge. However, the accused is not permitted to be present and is denied a face-to-face confrontation. The child is permitted to have present one support person and any other person whose presence the court feels will contribute to the well-being of the child. Thus, the child will be surrounded by "support persons."

Furthermore, this provision does not preclude these support persons from testifying later in the proceedings. Although it appears that this provision has been added to satisfy the *Ohio v. Roberts'* reliability requirement, the circumstances under which stage two is conducted [if the hearing even advances to this stage] seem to negate the credibility of the reliability hearing itself.

The second motion available to defense counsel under Sub H.B. 108 as passed by the Senate is that of requesting a second deposition of the child because "new evidence material to the defense has been discovered that the attorney for the defense could not with reasonable diligence have discovered prior to the taking of the admitted deposition." Thus, if the State seeks to introduce the videotaped interview and a deposition in lieu of the child's testimony at trial, the child may be required to undergo a second deposition if new evidence is uncovered. It is interesting to note that if the asserted State interest is to protect the child from trauma from re-living the incident, the child may now be required to relate the incident on at least four occasions: at the videotaped interviews, at the second stage of the reliability hearing, and at both depositions.

[155]States with legislation providing for videotaped testimony are: ALASKA STAT. § 12.45.047 (1984); ARIZ. REV. STAT. ANN. § 12-2311-12 (1982); ARK. STAT. ANN. §§ 43-2035 to 2037 (Supp. 1985); CAL. PENAL CODE §§ 1346-47 (West Supp. 1986); COLO. REV. STAT. § 18-3-413 (Supp. 1985); FLA. STAT. ANN. § 90.90 (West Supp. 1985); KY. REV. STAT. ANN. § 421.350 (Baldwin 1984); ME. REV. STAT. ANN. tit. 15, § 1205 (West 1985 Supp.); MONT. CODE ANN. §§ 46-15-401 to 403 (1985); N.M. STAT. ANN. § 30-9-17 (1978); N.Y. CRIM. PROC. LAW § 190.32 (McKinney 1986 Supp.); OKLA. STAT. tit. 22, § 753 (West Supp. 1985); S.D. CODIFIED LAWS ANN. § 23A-12-9 (Supp. 1985); TEX. CRIM. PROC. CODE ANN. § 38.071 (Vernon Supp. 1985); WIS. STAT. § 967.04 (1-043) (West Supp. 1985). States with legislation providing for closed-circuit televised testimony are: CAL. PENAL CODE § 1347 (West Supp. 1986); KY. REV. STAT. ANN. § 421.350(3) (Baldwin 1985); LA. REV. STAT. ANN. § 15:283 (West 1985 supp.); MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1985); OKLA. STAT. ANN. tit. 22, 753 (West Supp. 1985); TEX. CODE CRIM. PROC. ANN. art. 38.071(3) (Vernon Supp. 1985).